STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2011
v	No. 296128 Wayne Circuit Court
KOLBY JEREL WILLIAMS, Defendant-Appellant.	LC No. 09-013427-FC

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of armed robbery, MCL 750.529, and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 12 and one-half years to 24 years on the armed robbery convictions and to a two-year term on the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

On April 26, 2009, at approximately 2:30 a.m., Cartel Bennett, Jamal Wiley, and Daniel Claxton were robbed at gunpoint by two African-American males, one shorter and one taller, on Selden Street in Detroit. According to Bennett and Claxton, they each stood in close proximity to the shorter perpetrator at some point during the robbery. The shorter perpetrator, when he pointed a gun at Bennett, stood only two to three feet from Bennett, and he stood close enough to Claxton that they could "shove shoulders." Streetlights were on, and both Bennett and Claxton testified that there was enough light for them to see the face of the shorter perpetrator.

After the armed robbery, Bennett, Wiley, and Claxton went to a gas station, where they came into contact with Wayne State Police Officer Musa Mahoi. They reported the armed robbery to Mahoi, and gave him descriptions of the perpetrators. The descriptions included that the perpetrators were wearing white t-shirts and hats. While canvassing the area in his patrol car, Mahoi observed two males wearing white t-shirts walking north on Woodward Street. Mahoi activated his vehicle's lights, and the two males took off running. Mahoi chased the men, but lost them when they ran into a grassy, brush area. Other police officers arrived, and the officers set up a perimeter search. Detroit Police Officer Lawrence Addison, walking along a tree line, found defendant hiding under some branches. When Addison ordered defendant to show his

hands, defendant attempted to run, but the tree line prevented his escape. Addison arrested defendant.

Investigator Alfred Coleman of the Detroit Police Department put together a lineup of six men.[1] Defendant, at 5'7", was the shortest of the men. The others ranged from 5'9" to 6'6". The tallest man was 36 years old, fifteen years older than defendant. The other two shortest men weighed 260 and 220 pounds, while defendant weighed 155 pounds. The man who weighed 260 pounds was 31 years old, while another man was 27 years old.

Bennett, Wiley, and Claxton arrived at the police station at noon on April 26, 2009, to view the lineup. Before they viewed it, Coleman informed them that a suspect had been arrested. Bennett and Claxton identified defendant as one of the two men who robbed them. Bennett testified that he recognized defendant's face. Similarly, Claxton, while admitting that the other men in the lineup were "more huskier" or "way bigger" than defendant and that defendant's clothes had changed, testified that defendant's "face was still the same." Bennett and Claxton had no doubt that defendant was one of the two men who robbed them.[2]

Defendant testified that he was at the Sweetwater Tavern with Andrew Glass, a friend, until 1:45 a.m. on April 26, 2009. They then went to the Greektown Casino. Defendant stayed at the casino until 2:30 a.m., and because Glass had met a girl friend at the casino, he decided to walk home. He admitted that he ran and hid in some bushes when Mahoi ordered him to stop. Defendant testified that he ran because white officers from the Wayne State Police Department, including Mahoi, always harassed him.[3]

II. THE LINEUP

Defendant claims that the lineup was unnecessarily suggestive and violated his rights to due process when he was conspicuously the shortest person, weighed considerably less than some of the men, and was several years younger than many of them. We disagree.

Because defendant did not move the trial court to suppress the pretrial identifications, he has failed to preserve the issue for appellate review. *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). Accordingly, our review of defendant's claim is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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[1] The facts regarding the lineup and the identifications of defendant as one of the armed robbers are drawn from the trial testimony. There was no motion to suppress the identifications.

[2] Wiley did not pick defendant as one of the two robbers. At trial, Wiley testified that he did not see the faces of either of the two robbers.

[3] Mahoi testified that before April 26, 2009, he never had any contact with defendant.

A lineup can be so suggestive and conducive to irreparable misidentification that it denies a defendant due process of law. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The inquiry is not whether the lineup was suggestive, but whether under the totality of the circumstances it was so unduly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306, 318; 505 NW2d 528 (1993) (opinions of GRIFFIN, J. and BOYLE, J.); *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). Factors relevant to the totality of the circumstances include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Kurylczyk*, 443 Mich at 306 (opinion of GRIFFIN, J.).]

In addition, physical discrepancies among the participants do not necessarily render the lineup defective. *Hornsby*, 251 Mich App at 466. The discrepancies generally pertain to the weight of the identification, not its admissibility. *Id.* Physical discrepancies are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from other participants. *Kurylczyk*, 443 Mich at 312 (opinion of GRIFFIN, J.). In such cases, the witness selects the defendant on the basis of some external characteristic rather than the defendant's looks. *Id.* at 305 (opinion of GRIFFIN, J.).

We do not question defendant's contention that there were physical discrepancies between him and some of the other participants in the lineup. Defendant was the shortest of the participants, and two of the participants were almost a foot taller than him. One participant weighed 100 pounds more than him, while another outweighed him by 60 pounds. Indeed, Claxton testified that the other participants were "more huskier" or "way bigger" than defendant. In addition, several of the participants were older than defendant; the oldest being 36 years old.

However, under the totality of the circumstances, we conclude that the lineup was not so unduly suggestive that it led to a substantial likelihood of misidentification. *Kurylczyk*, 443 Mich at 306. The armed robbery occurred at approximately 2:30 a.m. on April 26, 2009. The street lamps were on, and both Bennett and Claxton testified that they were able to see the face of the shorter perpetrator. Nothing covered the perpetrator's face, and the perpetrator stood in close proximity to both Bennett and Claxton at some point during the robbery. Less than 12 hours after the armed robbery, Bennett and Claxton viewed the lineup. The two men were confident in their identification of defendant; neither had any doubt that defendant was one of the two armed robbers. In addition, the previous descriptions of the shorter perpetrator by Bennett and Claxton were not significantly different than defendant's actual physical characteristics.[4] Finally, although Claxton admitted that he excluded some of the participants because they weighed more than defendant, Claxton selected defendant based on defendant's looks. He

[4] For example, Claxton described defendant as 20 to 25 years old, 5'7", and weighing either between 160 and 180 pounds or 180 and 186 pounds.

specifically testified that defendant's "face remained the same," and that he selected defendant because of defendant's facial features. Similarly, Bennett testified that he recognized defendant because of defendant's face, as he "most definitely" remembered defendant's face. Because the lineup, under the totality of the circumstances, was not unduly suggestive that it led to a substantial likelihood of misidentification, defendant has not established that the lineup was plainly erroneous.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor improperly questioned him about whether he steals on occasion and about his poverty and unemployment. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Because defendant did not object to any of the alleged improper questions on the grounds of prosecutorial misconduct, our review is for plain error affecting defendant's substantial rights. *Id.*

Pursuant to MRE 609(a), the prosecutor asked defendant whether he had been convicted of any crimes involving theft or dishonesty within the past ten years. Defendant admitted that he had been convicted of larceny in a building and of second-degree retail fraud. The prosecutor then asked defendant if it was true that he steals on occasion. After defendant twice denied it, defense counsel objected.[5] The trial court sustained the objection, explaining that the prosecutor had established impeachment by prior conviction and retrial of the case would not be permitted. On appeal, the only case that defendant cites to support his claim that the prosecutor's questions whether he steals on occasion were improper is *People v Johnson*, 393 Mich 488, 496-497; 227 NW2d 523 (1975), which established that a defendant's poverty or unemployment is irrelevant to his guilt and his tendency to tell the truth.[6] Because the prosecutor's questions did not concern defendant's poverty or unemployment, defendant's reliance on *Johnson* does not provide support for the claim that the prosecutor's questions were improper. Under these circumstances, we conclude that defendant has not established that the prosecutor's questions about whether he steals constituted plain error affecting his substantial rights.

Included in this issue is a claim that the prosecutor's questions about defendant's employment status at the time of the armed robbery were improper. Without objection, defendant was asked if he had a job in April 2009. He responded that he did and named the places where he worked.

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[5] Defense counsel did not specify any ground for the objection.

[6] Contrary to defendant's question presented, the prosecutor did not question defendant about any uncharged conduct.

Evidence of a defendant's financial condition, because it generally has limited probative value and goes to a collateral issue, often distracts the jury. *People v Henderson*, 408 Mich 56, 65; 289 NW2d 376 (1980). It is not relevant to a defendant's guilt or his tendency to tell the truth. *Johnson*, 393 Mich at 496-497. Nonetheless, we do not find that the prosecutor's questions were clearly improper. Nothing in the record indicates that through this brief exchange, the prosecutor intended to use defendant's employment status to prove motive for the armed robbery or to show that defendant was a "bad man" or a "worthless individual." *Henderson*, 408 Mich at 66. In addition, even if the prosecutor's questions were improper, defendant cannot show that his substantial rights were affected. Defendant answered that he was employed at the time of the armed robbery. Moreover, given the evidence of defendant's guilt, which included the identifications by Barrett and Claxton of defendant as one of the armed robbers and defendant's act of running and hiding from the police, the question did not affect the outcome of the trial. *Carines*, 460 Mich at 763.

IV. RESENTENCING

Defendant argues that the trial court lacked the authority to resentence him after he had been remanded to jail to await the execution of his sentence. We disagree.

Defendant did not argue below that the trial court lacked the authority to resentence him. Accordingly, the issue is not preserved for appellate review, and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Defendant appeared before the trial court for sentencing on December 17, 2009. The parties agreed that the minimum sentence range under the sentencing guidelines for defendant's convictions for armed robbery was 81 to 135 months. The trial court sentenced defendant to minimum sentences of nine and one-half years. Defendant was resentenced by the trial court on December 21, 2009. According to the trial court, the guidelines had been scored incorrectly because the prior record variables (PRVs) were scored as if there was only one armed robbery.[7] With the PRVs rescored, the minimum sentence was 108 to 180 months. To keep with its intent to sentence defendant near the high end of the guidelines, the trial court resentenced defendant to minimum sentences of 12 and one-half years.

"A trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid." *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003); see also MCR 6.429(A) ("The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law."). A sentence is invalid if it is based on inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) (holding that the defendant's two-year sentence for felony-firearm was invalid where the presentence report failed to report a previous felony-firearm conviction and the enhancement

[7] The trial court did not specify the exact error in scoring the PRVs. However, because PRV 7, MCL 777.57, is scored for "subsequent or concurrent felony convictions," it appears that the scoring error related to PRV 7.

provision of the felony-firearm statute mandated a five-year sentence for a second conviction).[8] "[W]hen a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information." *People v Francisco*, 474 Mich 82, 89 n 7; 711 NW2d 44 (2006). A sentence may be invalid even if the error benefits the defendant because sentencing must "satisfy society's need for protection and its interest in maximizing the offender's rehabilitative potential." *Miles*, 454 Mich at 98 (internal quotation marks and citation omitted).

The trial court did not err in resentencing defendant. Defendant does not dispute that the PRVs, when originally scored, were scored incorrectly because they were scored as if there was only one armed robbery. Similarly, defendant does not dispute that the correct scoring of the PRVs results in a minimum sentence range of 108 to 180 months' imprisonment. Because the trial court sentenced defendant upon an inaccurate sentence range, defendant's original sentences of nine and one-half years were based on inaccurate information. *Francisco*, 474 Mich at 89 n 7. And because a sentence based on inaccurate information is an invalid sentence, *Miles*, 454 Mich at 96, the trial court had the authority to resentence defendant, MCR 6.429(A); *Moore*, 468 Mich at 579. Accordingly, we affirm defendant's sentences of 12 and one-half years to 24 years' imprisonment for the armed robbery convictions.

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[8] In *Miles*, the trial court sua sponte modified the defendant's sentence. Neither party had objected to the presentence report's failure to include the defendant's previous felony-firearm conviction.